

NTSB Order No. EA-3659

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 12th day of August, 1992

Respondent.

)
)
)
)
)
)
)
Docket SE-10439
)
)
)
)
)
)

Both respondent and the Administrator have appealed from the oral initial decision of Administrative Law Judge Jimmy N. Coffman, issued on May 22, 1990, following an evidentiary hearing.¹ The Administrator has also moved to strike respondent's appeal. We grant the Administrator's appeal, and strike that of respondent. We will address the motion to strike

5824

first.

Respondent's appeal is dated August 21, 1990, and the Administrator states that it was filed on that date.² Respondent acknowledges, however, that the appeal was due on August 10, 1990. Answer at ¶ 6. Respondent argues that the late filing should be excused as a legitimate mistake. He claims that, when the Administrator sought and obtained an extension from August 10 to August 24 to file complainant's appeal, respondent believed, from conversations with counsel for the Administrator, that the extension would apply to both parties.³

For two reasons, we do not find good cause to accept the late filing. First, respondent assumed a certain risk in presuming, not only that an extension would be applied to both parties, but that a sought extension would be granted. There is no indication that, prior to the August 10 due date, counsel even checked with the Board or with opposing counsel to see if any extension had been granted. If counsel chooses to make presumptions such as these, he must be prepared for the consequences. Second, respondent's alleged reliance on opposing counsel's obtaining an extension for both cannot extend beyond

²Respondent states only that his appeal was filed by August 24, 1990. Our records indicate that the appeal was date stamped received on August 27, 1990.

³Counsel for both parties discussed the matter on August 7 and, on that same day, the Board granted the extension. See August 8 confirmation letter to the Office of the General Counsel.

receipt of the August 8 letter, because that letter may not reasonably be read to grant respondent an extension.

At that point, counsel should have contacted the Board regarding any arguable misunderstanding.⁴ Respondent, however, took no action, instead choosing to wait even longer to file his brief, failing even to mention this matter until the motion to strike was filed. We do not find that these circumstances demonstrate good cause, under Administrator v. Hooper, NTSB Order EA-2781 (1988), to accept the late-filed appeal. Accord Administrator v. Royal American Airways, Inc., 5 NTSB 1089 (1986) ("absent some showing that the notice could not have been filed sooner, the risk of miscalculation must be borne by the party who has delayed filing until the last minute").

Remaining for decision is the appeal filed by the Administrator, to which we have received no reply from respondent. The Administrator challenges the law judge's reduction in sanction from the contemplated certificate revocation to a 1-year suspension. We agree, and will reinstate the Administrator's order of revocation.

The law judge found that respondent had violated Sections 61.3(a) and (d), and Section 61.19(f) of the Federal Aviation Regulations (14 C.F.R. Part 61). Sections 61.3(a) and (d) require that pilots and flight instructors hold current and

⁴This is especially true in this case, given respondent's past history of dealings with the Board. See discussion, infra.

appropriate certificates. Section 61.19(f) provides that, if a certificate is suspended or revoked, it must be returned to the Administrator. Respondent admitted that he acted as a pilot-in-command and flight instructor between April 14, 1987 and September 1, 1987. See Order of Revocation and respondent's February 15, 1988 letter/answer. Respondent claimed, however, that because he had not attended the April 3, 1987 hearing that led to the suspension of his certificate, and had never received notice of that initial decision, the suspension (and, therefore, the order of surrender) was not yet effective.⁵ The law judge rejected this defense and, accordingly, found that the regulations had been violated.⁶

In choosing to reduce the sanction, the law judge apparently was influenced by his rejection of the two Part 91 allegations, by his belief (Tr. at 103) that revocation was the equivalent of "the death penalty," and his belief that respondent did not "flaunt or flagrantly violate the regulations."⁷ Although the

⁵The April 3, 1987 30-day suspension remains in effect until the certificate has been in the Administrator's hands for 30 days. Administrator v. Garber, 4 NTSB 75, 77 (1983), at fn. 5.

⁶The law judge dismissed claims that respondent had also violated 14 C.F.R. 91.39(a) and (b) and 91.9.

⁷"I think the cases that [the Administrator's counsel] cited, I think they go to the point that an airman that flagrantly violates an order of suspension should get revocation, and I agree with that, just as if a driver goes out and drives a car after his license has been suspended or revoked and gets into an accident or gets into trouble and gets caught, I think they should receive a very severe penalty. Those pilots that receive a suspension and do go out and flaunt or flagrantly violate the

latter issue may be relevant, we are persuaded that, in the circumstances, revocation is appropriate and consistent with precedent.

It is well established that revocation is warranted if respondent performed under certificates, knowing they had been suspended. See, e.g., Administrator v. McCartney, 4 NTSB 925, 927 (1983). The law judge's decision would excuse a respondent who has no actual knowledge because he wilfully keeps himself in the dark about the results of a proceeding against him. For obvious reasons, such a result cannot be permitted.⁸

Here, respondent knew of the 1987 hearing and chose not to attend or to send counsel. Tr. at 22, 72. Not until the Notice of Proposed Certificate Action had been served in this proceeding did he seek a copy of the 1987 initial decision. Id. at 73. In the circumstances (notably his failure to appear personally or through counsel), he knew or should have known the very real risk that action at the 1987 hearing would have adversely affected his certificates. Respondent's failure or refusal to apprise himself

(..continued)
regulations, and say, 'I'm going to fly anyway with or without a license,' I think in those cases, a revocation is warranted.

In this case, due to the circumstances, some of which I've discussed and some of which I have not discussed, it doesn't not [sic] rise to the level of revocation." Initial decision, Tr. at 103.

⁸We have rejected similar arguments in the past. See, e.g., Administrator v. Royal American Airways, Inc., 5 NTSB 1090 (1986) (even though respondent did not attend hearing, he had knowledge of it and is chargeable with knowledge that a decision affecting his certificate might have been issued in his absence).

should not result in a reduced sanction. We therefore find that safety in air commerce or air transportation requires the revocation sought by the Administrator.⁹

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is rejected;
2. The Administrator's appeal is granted; and
3. The revocation of all airman certificates held by respondent shall begin 30 days from the date of service of this order.¹⁰

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

⁹Although respondent was found to have provided flight instruction in violation of § 61.3(d), the Administrator only seeks revocation of respondent's airman certificates. (The record indicates that respondent holds a commercial pilot certificate.) Revocation of any flight instructor certificate is not necessary to preclude its use. Flight instructor certificates may not be used when a pilot certificate is under suspension, as flight instruction requires a valid pilot certificate. 14 C.F.R. 61.183.

¹⁰For the purposes of this order, respondent must physically surrender his certificate(s) to an appropriate representative of the FAA pursuant to FAR § 61.19(f).